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## **Food Fraud: Protecting European Consumers Through Effective Deterrence**

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# Food Fraud: Protecting European Consumers Through Effective Deterrence

*The 2013 horsemeat scandal drew attention to the issue of food fraud in the European Union and highlighted the potential health and economic risks associated with such frauds. In the aftermath of the scandal, this article examines the effectiveness of the European Union's legal framework in protecting against future frauds. It argues that this will only be achieved if this operates as a strong deterrent, which places potential fraudsters at significant risk of being apprehended. In the light of this, the article evaluates the measures in place to deter fraud in both food products manufactured within the European Union and in those imported from third countries. In doing so, it examines both the European Union's legislative framework and the manner in which it has been implemented across Member States. Finally, the article concludes by examining Member State co-operation in addressing cross border food fraud, such as the one perpetrated in the horsemeat scandal itself.*

**Keywords:** Administrative Assistance and Co-Operation System, Consumer Protection, Eurojust, Europol, Food Fraud, Food Labelling, Official Controls, Rapid Alert System for Food and Feed, Traceability.

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## 1. Introduction

Food fraud has been defined as being “the deliberate and intentional substitution, addition, tampering, or misrepresentation of food, food ingredients or food packaging; or false or misleading statements made about a product, for economic gain.”<sup>1</sup> It essentially amounts to a fraudulent misrepresentation as to the nature or content of a food product. Food fraud became a prominent issue across the European Union in 2013, when the horsemeat scandal exposed the substitution of horsemeat for beef in some processed meat products. In practice, however, food fraud is an age old practice. Its origins can be traced back as far as ancient Rome, where the law prohibited the adulteration of food and the watering down of wine.<sup>2</sup> In most recent time, Gallagher and Thomas highlight a range of measures adopted by the United Kingdom Parliament in the eighteenth and nineteenth centuries to prohibit food fraud, commencing with the Adulteration of Coffee Act 1718.<sup>3</sup> In the European Union today, food fraud potentially affects a wide range of food products. Europol has highlighted the involvement of organised crime in counterfeiting a range of quality food products.<sup>4</sup> Additionally, as the horsemeat scandal itself revealed, criminal gangs can profit from frauds committed within modern food supply chain.

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<sup>1</sup> J. Spink and D.C. Moyer, ‘Defining the Public Health Threat of Food Fraud’ *Journal of Food Science* 76 (2011):R157, R.158.

<sup>2</sup> D. Armstrong, ‘Food Chemistry and US Food Regulation’ in *Journal of Agricultural and Food Chemistry* 57 (2009): 8180-86, 8180. For historical discussion see B. Wilson, *Swindled: the dark history of food fraud from poisoned candy to counterfeit coffee*, (Princeton University Press, 2008).

<sup>3</sup> M. Gallagher, I. Thomas, ‘Food Fraud. The Deliberate Adulteration and Misdescription of Foodstuffs’, (2010) 6 *European Food and Feed Law Review* 6 (2010): 347-353, 348.

<sup>4</sup> Europol, *Europol Review 2013* (The Hague: European Police Office, 2014) 56.

Ultimately, food fraud raises both consumer protection and broader economic issues. The horsemeat scandal triggered the health concern, which subsequently proved to be unfounded, that it had resulted in meat products being contaminated with the veterinary drug phenylbutazone.<sup>5</sup> However, the deaths of six children and the hospitalisation of thousands of others in China in 2008,<sup>6</sup> following the adulteration of milk and milk products with melamine, illustrates the scale of the potential health risks that can be associated with food fraud. There is also a danger that it may result in food products containing undisclosed food allergens, again exposing consumers to the risk of death or injury. Food fraud also undermines consumer choice and has important economic consequences for consumers and food companies. Clearly, it leads to consumers paying higher prices than are merited by the quality of the product. In addition, food companies who fall victim to frauds committed within their supply chains will also be affected financially by consumer rejection of affected products and of the brands associated with them.<sup>7</sup>

In the light of the horsemeat scandal, this article analyses the effectiveness of European Union food governance in preventing food fraud. It asks whether the European Union legal framework provides an effective deterrent against such frauds. The article commences by examining the role of deterrence in preventing food fraud. It then examines both the internal control measures that govern food produced within the European Union and the

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<sup>5</sup> See, European Food Safety Authority and European Medicines Agency, 'Joint Statement on the Presence of Residues of Phenylbutazone in Horsemeat', *European Food Safety Authority Journal* 11 (2013): 3190-3235.

<sup>6</sup> See C. Xiu, K. Klein, 'Melamine in milk products in China: examining the factors that led to deliberate use of the contaminant', *Food Policy* 35 (2010): 463-470.

<sup>7</sup> W. Van Rijswijk and L. Frewer, 'Consumer needs and requirements for food and ingredient traceability information', (2012) 36 *International Journal of Consumer Studies* 36 (2012): 282-290, 287.

external controls applied to goods imported into the Union. Finally, the article concludes by considering the measures in place to facilitate co-operation between competent authorities in individual Member States.

## **2. Deterring Food Fraud**

Regulation 178/2002 ('the Food Law Regulation') provides for European Union food law to aim 'at the prevention of fraudulent or deceptive practices, the adulteration of food and any other practices which may mislead the consumer.'<sup>8</sup> Although the Regulation leaves it to Member States to define the concept of fraud, it establishes the clear objective of preventing food fraud. This raises the question of whether the European Union's legal framework provides an effective deterrent against food fraud. In a seminal article, Becker argued that such deterrence is achieved when potential offenders conclude that the expected penalty associated with being caught committing a crime outweighs the monetary gain they will receive through committing that crime.<sup>9</sup> His approach has been criticised on the basis that much crime is actually committed on impulse and not based on a rational cost benefit analysis.<sup>10</sup> However, this is often not the case with economic crimes, such as food fraud, which are usually based upon comprehensive pre-planning. Consequently,

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<sup>8</sup> Regulation 178/2002 of 28 January 2002 of the European Parliament and of the Council laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, [2002] OJ L31/1, Article 8.

<sup>9</sup> G. Becker, 'Crime and Punishment: An Economic Perspective', *Journal of Political Economy* 76 (1968): 169-217.

<sup>10</sup> See, for example, Home Office, *Crime, Justice and Protecting the Public*, (London: HMSO, 1990) para. 2.8.

commentators have observed that Becker's model is particularly well suited to the analysis of profit-orientated criminality.<sup>11</sup>

In the aftermath of the horsemeat scandal the Commission has proposed that Member States should ensure that the financial penalties imposed upon criminals for intentional violations of food law should at least offset the economic advantage that those criminals had sought to gain.<sup>12</sup> The European Parliament, in contrast, has suggested that penalties for food fraud should be at least double the expected economic gain.<sup>13</sup> Such an approach, however, would risk being counter-productive if national courts were to consider such penalties to be disproportionate and proved reluctant to impose them. A more effective alternative would be for national courts to ensure criminals forfeited the profits they gained from food fraud, whilst also being free to impose additional punitive sanctions to reflect the gravity of the individual crime.<sup>14</sup> Equally, both the proposals of the Commission and the European Parliament only partially address Becker's concept of crime deterrence. Becker emphasised that criminals' were influenced not just by the sentences likely to be imposed upon them, but also by the likelihood of their being caught in the first place. Academic studies have suggested that this is actually more important than the size of the punishment

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<sup>11</sup> R. Bowles, M. Faure, N. Garoupa, 'Forfeiture of Illegal Gain: An Economic Perspective' *Oxford Journal of Legal Studies* 25 (2005):275-295, 282 and C. Abbot, *Enforcing Pollution Control Regulation: Strengthening Sanctions and Improving Deterrence*, (Oxford: Hart Publishing, 2009) 30.

<sup>12</sup> Commission, Proposal for a Regulation of the European Parliament and of the Council on official controls performed to ensure the application of food and feed law, rules on animal health and welfare, plant health, plant reproductive material and plant protection products, COM(2013)265, Article 136.

<sup>13</sup> European Parliament, Report on the food fraud crisis, fraud in the food chain and the control thereof, (2013)/2091 (INI), para. 63.

<sup>14</sup> See R. Bowles, M. Faure, N. Garoupa, *supra* n.11.

that is likely to be imposed.<sup>15</sup> This view has also been echoed by the United Kingdom's Environmental Audit Committee, which emphasised that corporate environmental crime will only be deterred when potential offenders believe there is a real threat that their actions will be detected.<sup>16</sup> Equally, a deterrence based approach to food fraud would require that there was a real threat that criminals engaging in this crime will also be caught.

### **3. Deterring Fraud in Food Produced Within the European Union**

The aims of the Food Law Regulation, in seeking to prevent fraudulent practice, are also reflected in Regulation 1169/2011, ('the Food Information Regulation'), which regulates the information contained on individual food labels. In particular, Article 7 of the Food Information Regulation requires that food labelling information must not be misleading as to the characteristics of food.<sup>17</sup>

Food labels are often be the first point of contact between consumers and food products. Those food products will also commonly be credence goods, whose characteristics cannot be accurately and independently evaluated by consumers.<sup>18</sup> In this situation, food labelling

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<sup>15</sup> See, D. Kennedy, *Deterrence and Crime Prevention: Reconsidering the Prospect of Sanction*, (London: Routledge, 2009) 11 and J. Henderson, J. Palmer, *European Journal of Law and Economics* 13 (2002): 143-156.

<sup>16</sup> Environmental Audit Committee, 2<sup>nd</sup> Report: Corporate Environmental Crime, (London: HC 2005) 136, para. 38.

<sup>17</sup> Regulation 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, [2011] OJ L304/18, Article 7(1)(a).

<sup>18</sup> S. Schwemer, 'Food for Thought- Revisiting the Rationale of Law-Based Food Origin Protection', *European Food and Feed Law Review* (2012): 134-142, 135.

information plays an important role in reassuring consumers and in redressing the asymmetry of information that exists between them and the producer.<sup>19</sup> In recent years the European Union has made greater use of mandatory food origin labelling to enable consumers to identify the place of origin of particular products. Mandatory obligations already require labels to specify the origins of food products such as honey and olive oil,<sup>20</sup> beef and minced beef,<sup>21</sup> and pig, sheep, goat and poultry meats.<sup>22</sup> These measures reflect consumer desire for greater information on the origin of food products following the large number of the food scares that have affected the food industry in recent decades.<sup>23</sup> Regulation 1169/2011 also requires the Commission to submit reports to the European Parliament and the Council concerning the possibility of extending these obligations to other foods including products such as other unprocessed meats, milk and single ingredient

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<sup>19</sup> See E. Tonkin, et al., 'The process of making trust related judgments through interaction with food labelling' *Food Policy* 63 (2016): 1-11.

<sup>20</sup> Council Directive 2001/110 of 20 December 2001 relating to honey, [2002] OJ L10/47, and Commission Regulation 1019/2002 of 13 June 2002 on marketing standards for olive oil, [2002] OJ L155/27.

<sup>21</sup> Regulation 1760/2000 of the European Parliament and of the Council of 17 July 2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products, [2000] OJ L204/1, Articles 13 and 14.

<sup>22</sup> Commission Regulation 1337/2013 of 13 December 2013 laying down rules for the application of Regulation 1169/2011 of the European Parliament and of the Council as regards the indication of the country of origin or place of provenance for fresh, chilled or frozen swine, sheep, goat and poultry meat, [2013] L335/19.

<sup>23</sup> See A. Bernues, A. Olaizola, K. Corcoran, 'Labelling information demanded by European consumers and relationships with purchasing motives, quality and safety of meat', *Meat Science* 65 (2003): 1095-1106, D. Menozzi, R. Halawany-Darson, C. Mora, G. Giraud, 'Motives towards traceable food choice: a comparison between French and Italian consumers', *Food Control* 49 (2015): 40-48.



foods.<sup>24</sup> However, as with all labelling requirements, food origin labels can only be effective if they are supported by adequate measures to ensure the veracity of their claims. Otherwise, food labels themselves simply provide further opportunities for fraud by unscrupulous operators, such as where conventional foods are labelled as being higher priced organic produce.<sup>25</sup> In turn, such frauds can be expected to undermine consumer confidence in the reliability of food labels and the quality of food products. Within the European Union, the traceability of food products and official controls conducted on food producers and on their products are the principal mechanisms available to enable competent authorities to verify the accuracy of food labels and the authenticity of food products.

The Commission's 2000 white paper on food safety identified traceability as being a core element within European Union food policy.<sup>26</sup> In particular, by increasing the transparency of the food chain, it has the potential to play an important role in deterring food fraud. Additionally, the concept of traceability also helps to build consumer confidence in both

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<sup>24</sup> Regulation 1169/2011, *supra* n. 17, Article 26(4). See Commission report regarding the mandatory indication of the country of origin or place of provenance for unprocessed foods, single ingredient products and ingredients that represent more than 50% of a food, COM (2015) 204 final and Commission report regarding the mandatory indication of the country of origin or place of provenance for milk, milk as an ingredient in dairy products and types of meat other than beef, swine, sheep, goats and poultry meat COM (2015) 205 final.

<sup>25</sup> G. Anania, R. Nisticò, 'Public regulation as a substitute for trust in quality food markets: what if the trust substitute cannot be fully trusted?' *Journal of Institutional and Theoretical Economics* 160 (2004): 681-701, 683.

<sup>26</sup> Commission, *White Paper on Food Safety*, COM (1999) 719 final, 8.

food safety and food quality.<sup>27</sup> Consumers often view traceability as providing a guarantee as to the authenticity and origins of the food products they purchase.<sup>28</sup> This equally corresponds with the definition of traceability contained in the Food Law Regulation, which defines it as being the ability to trace and follow food and feed products through all stages of their production, processing and distribution.<sup>29</sup> In practice, however, the European Union's traceability requirements fall short of such expectations.

Instead of a comprehensive field to fork style traceability system encapsulating the entire food chain, the Food Law Regulation introduces a 'one up, one down' requirement. This requires that operators involved in the production, processing or distribution of food or feed can identify every person from whom they have been supplied food, feed, food producing animals or substances they will incorporate within food or feed.<sup>30</sup> They must also be able to identify businesses they themselves supply with these products.<sup>31</sup> The 'one up one down' approach imposes individual recording requirements upon each operator in the production and distribution chain. However, there is no requirement for information on the origin or content of foods to accompany food products as they journey along this chain. Consequently, food authorities seeking to trace the origins of particular food products must

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<sup>27</sup> M. Aung, Y. Chang, 'Traceability in a food supply chain: Safety and quality perspectives,' (2014) 39 *Food Control* 39 (2014): 172-184, 177.

<sup>28</sup> See O. Kehagia et al., 'European Consumers Perceptions, Definitions and Expectations of Traceability and the Importance of Labels and the Differences in These Perceptions by Product Type,' *Sociologia Ruralis* 47 (2007): 399-416 and W. Van Rijswijk, L. Frewer *supra* n.7.

<sup>29</sup> Regulation 178/2002, *supra* n. 8, Article 3(15).

<sup>30</sup> Regulation 178/2002, *supra* n. 8, Article 18(2).

<sup>31</sup> Regulation 178/2002, *supra* n. 8, Article 18(3).

examine each step in the production process. As each operator employs their own traceability practices, it may often not be possible to trace the entire production process.<sup>32</sup> This, for example, has been observed in relation to organic products. In the absence of effective traceability measures it can often be difficult to confirm that food products have been produced to organic standards. However, in 2012 the Court of Auditors identified significant weaknesses in the traceability of organic produce.<sup>33</sup> Auditors purchased 85 organic products across six Member States and required competent authorities to trace each back to its initial producer within a three month period.<sup>34</sup> This was not achieved in forty per cent of cases, whilst in a further 52 per cent the competent authorities were unable to identify each operator involved in the food chain and to certify their compliance with organic standards.<sup>35</sup> In turn, such outcomes underline the weakness of current traceability requirements in acting as a deterrent to food fraud. It also places responsibility on actors such as food retailers to unilaterally introduce more comprehensive measures in place within their own food chains, to avoid reputational damage amongst consumers.<sup>36</sup>

In addition to the general one up, one down traceability requirement, specific measures have also been introduced for particular categories of livestock. A comprehensive analysis of the measures introduced for all livestock is beyond the scope of this article. Consideration,

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<sup>32</sup> See C. Charlier, E. Valceschini, 'Co-ordination for traceability in the food chain. A critical appraisal of European regulation,' *European Journal of Law and Economics* 25 (2008): 1-15, 4.

<sup>33</sup> Court of Auditors, Special Report 9/2012: Audit of the Control System Governing the Production, Processing, Distribution and Import of Organic Products, (Luxembourg: Publications Office of the European Union, 2012).

<sup>34</sup> *Ibid*, para. 48.

<sup>35</sup> *Ibid*.

<sup>36</sup> C. Charlier, E. Valceschini, *supra* n. 32, 14.

however, will be given to the measures introduced for horses and cattle that are intended for the food chain. In the case of horses and ponies, animals born in or imported into the European Union must be registered and issued with an identification document, 'a horse passport'.<sup>37</sup> This in turn must be presented when animals are sent to an abattoir.<sup>38</sup> Additionally, since July 2009 there has also been provision for microchips to be inserted into each animal, containing a unique code that can be checked against their passport.<sup>39</sup> Ultimately these measures were principally motivated by concern to ensure that meat sold as horsemeat is not unfit for human consumption due to the presence of veterinary drugs.<sup>40</sup> Reforms introduced in 2015 have made it more difficult for unscrupulous owners to undermine this objective. They include a requirement for Member States to introduce centralised databases on registered animals.<sup>41</sup> Additionally, owners are now required to notify either the database handler or passport issuing body when veterinary surgeons administered drugs that are not authorised for use in food producing animals.<sup>42</sup> This augments the existing requirement that veterinary surgeons should record this information in the horse passport.<sup>43</sup> However, the fact that a large number of bodies remain eligible to issue horse passports in each Member State remains a significant weakness. In the United

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<sup>37</sup> Commission Regulation 2015/262 of 17 February 2015 laying down rules as regards the methods for the identification of equidae, OJ [2015] L59/1, Article 4.

<sup>38</sup> *Ibid*, Article 26.

<sup>39</sup> Initially introduced by Commission Regulation 504/2008 on methods for the identification of equidae, [2008] OJ L149/3, today see Commission Regulation 2015/262, *supra* n. 37, Article 18.

<sup>40</sup> See Commission Regulation 2015/262, *supra* n. 37, recital 5.

<sup>41</sup> Commission Regulation 2015/262, *supra* n. 37, Article 39.

<sup>42</sup> Commission Regulation 2015/262, *supra* n. 37, Article 37(4).

<sup>43</sup> Commission Regulation 2105/262, *supra* n.37, Article 37(3).

Kingdom alone over 70 different organisations are currently authorised to do so.<sup>44</sup> This makes it more difficult for competent authorities to spot counterfeit or altered documents, particularly in animals originating from other Member States.<sup>45</sup>

Following the Bovine Spongiform Encephalopathy (BSE) crisis of the late 1990s, even more comprehensive traceability measures have been implemented for cattle. These combine the use of compulsory ear tags, with the use of centralised databases in each Member State and individual farm registers to record the birth, death and movement of cattle.<sup>46</sup> Cattle leaving a holding, whether to go to mart or an abattoir, must also be accompanied by an identification document, or 'cattle passport.'<sup>47</sup> Furthermore, compulsory labelling requirements seek to ensure that beef carcasses, quarters and meat pieces can be linked to both the animals they came from, the abattoir in which they were killed and the cutting house in which they were dissected.<sup>48</sup> Despite these measures, significant weaknesses have been identified in the traceability of beef and minced meat.

In an audit conducted in 2002, the Commission's Food and Veterinary Office found that serious deficiencies existed in many Member States in relation to the ability to trace beef from the retail and distribution sectors, even to the preceding stage of the production

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<sup>44</sup> See DEFRA, Horse passport issuing organisations that manage studbooks (London: DEFRA, 2015) and DEFRA, Horse passport issuing organisations that do not manage studbooks (London: DEFRA, 2015).

<sup>45</sup> See, *Removing the Blinkers: The Health and Welfare of European Equidae in 2015*, (World Horse Welfare and Eurogroup for Horses, 2015) 52.

<sup>46</sup> Regulation 1760/2000, *supra* n. 21, Articles 4 and 5.

<sup>47</sup> Regulation 1760/2000, *supra* n.21, Article 6.

<sup>48</sup> Regulation 1760/2000, *supra* n.21, Article 13.

chain.<sup>49</sup> Particular weaknesses were identified in relation to meat sent from abattoirs for cutting, mincing and processing.<sup>50</sup> As a consequence, the Food and Veterinary Office reported that it was not confident that this meat could be traced back to the abattoir from which it came.<sup>51</sup> They attributed this to a combination of poor record keeping, failings in meat identification within establishments, shortfalls in labelling and the mixing of meats from different sources.<sup>52</sup> A subsequent audit, conducted in 7 Member States between 2009 and 2011 again emphasised the poor traceability of beef products.<sup>53</sup> The Food and Veterinary Office noted that it could not be confident that beef or mince could be traced back to the animal from which it derived.<sup>54</sup> Ultimately, these reports are symptomatic of the fact that Member State controls have focused principally on preventing diseased animals from entering the food chain, rather than deterring food fraud throughout that chain. In particular, these traceability weaknesses highlight potential fraud risk at the post abattoir stage of meat production.

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<sup>49</sup> Commission, Overview Report of a Series of Missions Carried Out in All Member States During 2002 in Order to Evaluate the Operation of Controls Over the Traceability and Labelling of Beef and Minced Meat, DG(SANCO)/9505/2003, para. 3.4.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> Commission, Overview of a Series of Audits Carried Out in Seven Member States During 2009-2011 in Order to Evaluate the Operation of Controls Over the Traceability and Labelling of Beef and Beef Products, DG (SANCO) 2012-6624.

<sup>54</sup> *Ibid*, para. 4.3.

Beyond traceability, Regulation 882/2004 also establishes a legal framework for Member State controls over food and feed production.<sup>55</sup> The Regulation stipulates that “official controls shall be carried out at any of the stages of production, processing and distribution of feed or food and of animals and animal products.”<sup>56</sup> This requirement is also replicated in more recent Commission’s proposals to reform this legal framework.<sup>57</sup> However, the National Audit Office has noted that, in practice, controls on the processed meat supply chain within the United Kingdom concentrate principally on the beginning of the meat processing chain.<sup>58</sup> They ascribe this largely to the scale of the legislative obligations imposed by European Union legislation.<sup>59</sup> In particular, legislation governing the operation of abattoirs imposes significant requirements upon Member States.<sup>60</sup> This, however, creates opportunities for criminals to exploit weaknesses in controls at the post abattoir stage of meat production. Ultimately, If Member States are to deter food fraud then effective controls must be applied throughout the food chain.

Regulation 882/2004 also requires Member States to ensure that their controls are conducted regularly and with appropriate frequency.<sup>61</sup> Competent authorities are required to adopt a risk based approach in applying this provision, taking account of the risks

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<sup>55</sup> Regulation 882/2004 of 29 April 2004 of the European Parliament and of the Council on official controls performed to ensure the verification of compliance with feed and food law, [2004] OJ L165/1.

<sup>56</sup> *Ibid*, Article 3(3).

<sup>57</sup> See Commission, *supra* n.12, proposed Article 9.

<sup>58</sup> Comptroller and Auditor General, Food Safety and Authenticity in the Processed Meat Supply Chain, (London: HC-685, Session 2013-14), 34.

<sup>59</sup> *Ibid*.

<sup>60</sup> See Council Regulation 1099/2009 on the protection of animals at the time of killing [2009] OJ L303/1.

<sup>61</sup> Council Regulation 882/2004, *supra* n. 55, Article 3(1).

associated with each food business, the business's previous compliance record, the reliability of checks that the business itself has been conducting and any information that indicates non-compliance with European Union food and feed law.<sup>62</sup> A similar requirement is also set out in Commission proposals to reform this legal framework.<sup>63</sup> In each case, however, Member States are granted considerable discretion in determining the frequency of their inspection regimes. This, in turn, facilitates the development of broad differences in national practice and creates opportunities for fraudsters to exploit weaker controls within particular Member States. The Court of Auditors criticised a similar approach under the European Union's geographical indicators scheme, which protects quality foods from particular European Union regions.<sup>64</sup> However, the Court of Auditor's call for the introduction of minimum inspection requirements was rejected by the Commission.<sup>65</sup> It argued that the broad discretion accorded to Member States took account of the principle of subsidiarity and the diversity of situations that existed across Member States.<sup>66</sup> In practice, however, the same argument would also justify the introduction of minimum inspection requirements.

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<sup>62</sup> *Ibid.*

<sup>63</sup> Commission, *supra* n 12, proposed Article 8(1).

<sup>64</sup> Under Regulation 1151/2012 of 21 November 2012 of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs, [2012] OJ L343/1.

<sup>65</sup> Court of Auditors, Special Report 11/2011: Do the Design and Management of the Geographical Indicators Scheme Allow it to be Effective? (Luxembourg: Publications Office of the European Union, 2011) 7-8 and 35.

<sup>66</sup> *Ibid.*, 35.



Equally, as the European Parliament has noted,<sup>67</sup> it is also important to that Member State controls should actually target food fraud and not simply focus on other food issues. Commission guidelines currently identify food fraud as one of 21 different food safety issues to be addressed by national controls, with others ranging from animal health and welfare to the chemical and biological safety of food products.<sup>68</sup> The Commission proposals to reform the European Union's legal framework on official controls over food and feed similarly identify food fraud as being one of a range of issues that should be examined by those controls.<sup>69</sup> The danger exists that if national controls concentrate on other issues, they create a regulatory vacuum for food fraud. For example, within the United Kingdom, the Elliott Review on the integrity of food supply networks ('the Elliott Review') identified risks associated with animal by-products not intended for human consumption.<sup>70</sup> These by products are categorised according to the risk they pose to human and animal health.<sup>71</sup> Category 3 materials are lower risk meats eligible for use in pet food.<sup>72</sup> The Elliott Review pointed out that considerable profits could be made through the purchase of such meat at

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<sup>67</sup> European Parliament, *supra* n.13, para.17.

<sup>68</sup> Commission Decision 2007/363/EC of 21 May 2007 setting out guidelines to assist Member States in preparing the single integrated multi-annual national control plan provided for in Regulation 882/2004 of the European Parliament and the Council, [2007] OJ L138/24.

<sup>69</sup> Commission, *supra* n.12, proposed Article 1(2).

<sup>70</sup> C. Elliott, Review into the Integrity and Assurance of Food Supply Networks: Final Report (London: HM Government, 2014), 46.

<sup>71</sup> Regulation 1069/2009 of 21 October 2009 of the European Parliament and of the Council laying down Community health rules concerning animal by-products not intended for human consumption, [2009] OJ L300/1, Article 7.

<sup>72</sup> *Ibid*, Articles 10 and 14.

pet food prices and subsequent resale as being meat fit for human consumption.<sup>73</sup> However, it also revealed that inspections of animal by-products cold stores within the United Kingdom targeted risks to hygiene, not fraud.<sup>74</sup>

#### **4. External Controls on Food Fraud**

The European Union is also a major importer of food and agricultural produce. Consequently controls at its external borders also play a prominent role in deterring food fraud. In contrast, criminals' intent on profiting from food fraud can be expected to exploit weaknesses in these controls in order to gain access to the internal market.

The legal framework for import controls is set out in Regulation 882/2004 on official controls on food and feed, supported by Council Directive 97/78 on veterinary checks on animals, plants and unprocessed animal and plant products entering the European Union from third countries.<sup>75</sup> Additionally, the Food Law Regulation also authorises the Commission to introduce emergency controls on food or feed imports judged likely to pose serious risks to human or animal health or to the environment.<sup>76</sup> Once again, however, the prevention of food fraud is only one of a number of food policy goals pursued by each of these measures. Therefore, as in the case of controls upon food production within the European Union, food fraud may again be side-lined by other issues. Indeed this is clearly

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<sup>73</sup> C. Elliott, *supra* n.70, 46.

<sup>74</sup> *Ibid.*

<sup>75</sup> Regulation 882/2004, *supra* n. 55 and Directive 97/78 laying down the principles governing the organisation of veterinary checks on products entering the Community from third countries, [1997] OJ L24/9.

<sup>76</sup> Regulation 178/2002, *supra* n. 8, Article 53(1) (b).

illustrated within the European Union's own legal framework. Regulation 882/2004 provides for the European Union to establish a series of reference laboratories to guide national practice "in all areas of feed and food law and animal health."<sup>77</sup> Yet, as the Elliott Review has pointed out, it makes no provision for these to include laboratories concerned with adulteration or the detection of other aspects of food fraud.<sup>78</sup>

The deterrent value of the European Union legal framework on import controls is also heavily reliant upon Member State implementation. However, neither food fraud nor compliance with food law generally has traditionally been a priority concern for Member States. As the Food and Veterinary Office has noted, in practice, Member State border controls have tended to prioritise more traditional crimes, such as drugs smuggling and the evasion of import duties.<sup>79</sup> Its reports also highlight a similar failure to prioritise food and feed in operationalising their border controls and in exercising oversight over them. For example, Member States are required to ensure that designated entry points are adequately staffed, with suitably qualified and experienced personnel, and have appropriate facilities and equipment to conduct import checks on food and feed.<sup>80</sup> Yet inspection visits have previously highlighted insufficient staffing levels at individual border posts across the

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<sup>77</sup> *Ibid*, recital 19.

<sup>78</sup> C. Elliott *supra* n.70, 31. See also Regulation 882/2004, *supra* n. 55, Article 32 and Annex VII.

<sup>79</sup> Commission, Final General Report of Missions Carried Out in 15 Member States Concerning Illegal Imports of Products of Animal Origin and Live Animals 2004-5, DG (SANCO)/8501/2006-GR Final, 7.

<sup>80</sup> Commission Regulation 669/2009 of 24 July 2009 implementing Regulation 882/2004 of the European Parliament and of the Council as regards the increased level of official controls on imports of certain feed and foods of non-animal origin, [2009] OJ L194/11, Article 4.

European Union that undermine the ability to implement effective import controls.<sup>81</sup> The Food and Veterinary Office has also drawn attention to widespread failings in the training of border inspection and laboratory staff.<sup>82</sup> Indeed deficiencies detected in a number of laboratories inspected led it to question the reliability of their analytical results.<sup>83</sup> The lack of prioritisation of food safety issues is also evident in failings in oversight. Regulation 882/2004 requires Member States to audit the effectiveness of their control measures concerning food and feed imports.<sup>84</sup> However, the Food and Veterinary Office reported in 2009 that few Member States actually had audit systems in place.<sup>85</sup> More recently, in 2011, its inspections revealed that only three Member States fully complied with the Regulation's audit obligations.<sup>86</sup> Collectively these weaknesses serve to undermine the deterrent effect of European food law in preventing food fraud. Unfortunately, this has been further amplified by weaknesses and inconsistencies in the application of individual control measures.

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<sup>81</sup> Commission, General Report of the Missions Carried Out in Member States to Evaluate Import Controls at Border Inspection Posts 2004-2006, DG (SANCO) 2007-7617- GR Final, 5.

<sup>82</sup> Commission, Overview Report of a Series of Audits Carried Out in 2010 and 2011 in Certain Member States to Assess the Official Controls on Food of Non Animal Origin, DG (SANCO) 2011 -6577 Final, 8.

<sup>83</sup> *Ibid*, 18.

<sup>84</sup> Regulation 882/2004, *supra* n. 55, Article 4(6).

<sup>85</sup> Commission, Overview Report on a Series of Missions in Certain Member States to Assess the Control Measures in Place for Import Controls on Food of Non Animal Origin and to Monitor Compliance with Commission Decisions Imposing Special Conditions on the Import of Certain Products Regarding Mycotoxin and Sudan Dyes Adulteration, OR No. 2009-8328, 9.

<sup>86</sup> Commission, Final General Overview Report of the Missions Carried Out in Member States in Order to Evaluate the Import Controls at Border Inspection Posts 2007-2009, DG(SANCO) 2011-6255 MR Final, 5.

The European Union's legal framework requires competent authorities to conduct documentary checks on imported goods as well as identity checks, to confirm they match their description, and physical examinations of the products themselves. Regulation 882/2004 gives Member States broad discretion, providing for systematic documentary checks and for random identify checks on imported food and feed.<sup>87</sup> In contrast, Directive 97/78 provides for documentary and identity checks to be conducted on each consignment of imported animals plants and animal and plant products.<sup>88</sup> Regulation 882/2004 also provides for Member States to adopt a risk based approach in determining the frequency of the physical checks conducted on imported food and feed.<sup>89</sup> In contrast, Directive 97/78 requires them to conduct physical checks on at least one per cent of the items contained in each consignment, subject to a minimum of one item and a maximum of 10.<sup>90</sup>

The Commission has proposed that, in future, Member States should also be required to adopt a risk based approach in determining the frequency of the physical examinations on animals, plants and animal and plant products.<sup>91</sup> In theory this should result in these inspections becoming more targeted, with more frequent inspections being conducted on products that have been associated with food fraud or are believed to be at risk from fraudulent activity. In practice, as was the case in relation to domestic food production, the broad discretion granted to Member States in implementing the risk based approach when conducting physical checks on food and feed has resulted in wide variations in practice.

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<sup>87</sup> Regulation 882/2004, *supra* n. 55, Article 16(1).

<sup>88</sup> Directive 97/78, *supra* n. 75, Articles 4(3) and 4(4).

<sup>89</sup> Regulation 882/2004, *supra* n.55, Article 16(2).

<sup>90</sup> Directive 97/78, *supra* n. 75, Annex III.

<sup>91</sup> Commission, *supra* n. 12, proposed Article 47(3).

Member States are required to approach this issue on the basis of the risks associated with particular food and feed, the compliance history of the exporting country and of the exporting and importing businesses, the controls that the importer has carried out and guarantees that have been provided by competent authorities within the exporting country.<sup>92</sup> However, broad differences have emerged in both the commodities identified for more frequent inspections and the frequency with which those inspections have been conducted.<sup>93</sup> This illustrates the fact that widely differing approaches to risk assessment are being adopted across the European Union. In turn this creates the opportunity for forum shopping, where importers choose entry points where they believe fraudulent practices are less likely to be detected. The Commission has also proposed that it should be able to legislate to establish criteria and procedures to determine the frequency of physical inspections.<sup>94</sup> Such measures would help to ensure greater consistency of practice across the European Union. However, the Commission's proposals are limited to physical inspections on animals, plants and animal and plant products.<sup>95</sup> Experience shows that, to be truly effective, such measures should also extend to physical inspections on food and feed.

Additionally, the obligation for Member State competent authorities to require food and business operators to provide prior notification of imports is a key element of the risk based

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<sup>92</sup> *Ibid.*

<sup>93</sup> Commission, Final General Overview Report of the Missions Carried Out in Member States in Order to Evaluate the Import Controls at Border Inspection Posts 2007-2009, DG (SANCO) 2011-6255 MR Final, 4 and 11.

<sup>94</sup> Commission, *supra* n. 12, proposed Article 52(2).

<sup>95</sup> *Ibid.*

inspection approach.<sup>96</sup> Without it, decisions often cannot be made with the benefit of an adequate risk assessment. Despite this, the Food and Veterinary Office has consistently highlighted the poor implementation of this requirement across Member States.<sup>97</sup> This failing has also been compounded by poor co-operation between border control staff and customs authorities.<sup>98</sup> The Commission has suggested that Member States should have an obligation to ensure border control staff, customs authorities and other authorities co-operate closely to ensure that official controls are conducted effectively.<sup>99</sup> However, as with the requirement to ensure border posts are adequately staffed with suitably qualified

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<sup>96</sup> Prior notification is required by Regulation 882/2004, *supra* n. 55, Article 17(1), and by Directive 97/78, *supra* n. 75, Article 3(3).

<sup>97</sup> See variously Commission, Overview Report of a Series of Audits Carried Out in 2010 and 2011 in Certain Member States to Assess the Official Controls on Food of Non Animal Origin, DG(SANCO) 2011 -6577, 11; Commission, Final General Overview Report of the Missions Carried Out in Member States in Order to Evaluate the Import Controls at Border Inspection Posts 2007-2009, DG(SANCO) 2011-6255 MR Final 6-11; Commission, Final General Report of Missions Carried Out in 15 Member States Concerning Illegal Products of Animal Origin and Live Animals 2004-2005, DG (Sanco)/8501/2006-GR,11; Commission, General Review Report of the Missions Carried Out in Member States Concerning Veterinary Checks at Border Inspection Posts 2002-03, DG(SANCO)8508/2004-GR, 8.

<sup>98</sup> See variously Commission, Final General Overview Report of the Missions Carried Out in Member States in Order to Evaluate the Import Controls at Border Inspection Posts 2007-2009, DG(SANCO) 2011-6255 MR Final 6; Commission, General Review Report of the Missions Carried Out in Member States to Evaluate Import Controls at Border Inspection Posts 2004-2006, DG(SANCO) 2007-7617 GR Final, p.17; Commission, General Review Report of the Missions Carried Out in Member States Concerning Veterinary Checks at Border Inspection Posts 2002-2003, DG(SANCO) 8508/2004-GR, 4, 8 & 14; Commission, General Review Report of the Missions Carried Out in Member States Concerning Veterinary Checks at Border Inspection Posts, DG(SANCO)9001/2002-GR, 3 & 6.

<sup>99</sup> Commission, *supra* n. 12, proposed article 73(1).

personnel, this obligation would carry little weight unless compliance is adequately enforced. Conversely, an on-going failure to address these issues will perpetuate a central weakness in the European Union's controls that remains open to criminal exploitation.

The Commission has also suggested that competent authorities should have a specific obligation to intensify controls where fraudulent behaviour is suspected.<sup>100</sup> However, their proposal is included as a subsection to a measure concerned with controls on animals, plants and animal and plant products. This suggests that the obligation would also be limited to these products. In practice, as the horsemeat scandal illustrated, it can only be fully effective if applied to all food and feed. Additionally, where it does apply, the Commission has proposed that suspicion of fraudulent behaviour should result in an obligation for competent authorities to intensify official controls 'on consignments with the same origin or use as appropriate.'<sup>101</sup> Unfortunately, Member States have been inconsistent in their application of a similar obligation under Directive 97/78. This requires that when there has been a serious or repeated infringement of veterinary requirements, competent authorities should impound the next ten consignments 'of the same origin' and subject these to physical inspection.<sup>102</sup> Yet differing approaches have been evident in determining whether consignments are actually of the same origin. In Belgium, France, Germany, Italy and Portugal 'origin' has been interpreted as referring to the exporting food business.<sup>103</sup> In

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<sup>100</sup> *Ibid*, proposed Article 63(4).

<sup>101</sup> *Ibid*.

<sup>102</sup> Directive 97/78, *supra* n.75, Article 24(1).

<sup>103</sup> Commission, Final Report of a Mission to 8 Member States from 18 to 29 November 2002 Concerning the Implementation of Safeguard Measures and Reinforced Checks in Border Inspection Posts, DG(SANCO) 8735/2002 MR Final, 11.



contrast, in the Netherlands and Spain it has applied to the country of export.<sup>104</sup> This once again illustrates the need for more robust co-ordination of Member State actions. This is further illustrated by the fact that whilst the Netherlands and Portugal conducted physical inspections on the next ten consignments imported through each border post, Belgium and Italy have done so in relation to the next ten consignments imported into the Member State as a whole.<sup>105</sup>

Finally, inconsistent application has also weakened the implementation of enhanced controls to address food emergencies. The Food Law Regulation enables the Commission to adopt emergency measures where foods are considered to pose a serious risk to human or animal health or the environment.<sup>106</sup> Commission Decision 2006/504, for example, identifies foodstuffs considered to be at risk of contamination by aflatoxins.<sup>107</sup> It prohibits their import into the European Union unless accompanied by documentation confirming the results of analysis conducted within the exporting country and a health certificate issued by an appropriate authority within that country. The Food and Veterinary Office has identified inconsistencies in the application of these requirements in four Member States that enabled produce to be imported without meeting these requirements.<sup>108</sup> Member States are also

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<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid*, Annex II.

<sup>106</sup> Regulation 178/2002, *supra* n. 8, Article 53(1) (b).

<sup>107</sup> Commission Decision 2006/504 imposing special conditions governing the import of certain foodstuffs from third countries due to contamination by aflatoxins, [2006] OJ L199/21, Article 3.

<sup>108</sup> Commission, Overview Report on a Series of Missions in Certain Member States to Assess the Control Measures in Place for Import Controls on Food of Non Animal Origin and to Monitor Compliance with

required to subject imports of chilli, chilli products, curcuma and palm oil to more frequent identity checks and physical inspections.<sup>109</sup> This is due to a risk that these products may have been adulterated with potentially carcinogenic Sudan food dyes. Today these controls must be conducted on 20 per cent of imported produce.<sup>110</sup> Previously, Member States were simply required to conduct random sampling and analysis on these products.<sup>111</sup> The Food and Veterinary Office identified significant weaknesses in the application of the previous controls within three Member States. No inspections at all were being conducted within one Member State, few inspections were being conducted relative to the level of imports in a second and in a third, samples were only being analysed in relation to one of four prohibited food dyes.<sup>112</sup> Such weaknesses potentially undermine the protection of the single market and, ultimately, of European consumers. They also limit the deterrent value of the European Union controls by creating gaps that criminals may exploit with more limited fear of being exposed.

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Commission Decisions Imposing Special Conditions on the Import of Certain Products Regarding Mycotoxin and Sudan Dyes Adulteration, OR No. 2009-8328, 10.

<sup>109</sup> Commission Regulation 669/2009 *supra* n. 80.

<sup>110</sup> *Ibid*, Article 8(1) and Annex I.

<sup>111</sup> Commission Decision 2005/402 on emergency measures regarding chilli, chilli products, curcuma and palm oil, [2005] OJ L135/34, Article 3.

<sup>112</sup> Commission, Overview Report on a Series of Missions in Certain Member States to Assess the Control Measures in Place for Import Controls on Food of Non Animal Origin and to Monitor Compliance with Commission Decisions Imposing Special Conditions on the Import of Certain Products Regarding Mycotoxin and Sudan Dyes Adulteration, OR No. 2009-8328, 10.

## 5. Member State Co-Operation in Tackling Cross Border Food Fraud

Given the cross border reach of modern food chains and of many criminal networks, effective action to tackle food fraud often involves more than one Member State. The horsemeat scandal itself involved a food processing company in France, its subsidiary in Luxembourg, a sub-contractor in Cyprus, a meat trader in the Netherlands, abattoirs in Romania and food retailers across a number of Member States.<sup>113</sup> The European Union's Rapid Alert System for Food and Feed (RASFF) played a prominent role in alerting Member State authorities to the scandal. Operating under the Food Law Regulation,<sup>114</sup> RASFF provides an information sharing network that connects the European Commission and European Food Safety Authority with food authorities in each Member State and in Iceland, Liechtenstein, Norway and Switzerland.<sup>115</sup>

RASFF enables Member States to share information on identified food risks, whether arising from fraud or other concerns. Where enforcement action against those responsible has a cross border element the European Union's Administrative Assistance and Co-Operation system requires Member States to co-operate in addressing these issues.<sup>116</sup> However, as the European Parliament has highlighted,<sup>117</sup> the horsemeat scandal revealed that co-ordination between national food authorities was generally weak. In response, the Commission established the Food Fraud Network in 2013. This required that each Member State should

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<sup>113</sup> Comptroller and Auditor General, *supra* n.58, 5.

<sup>114</sup> Regulation 178/2002, *supra* n. 8, Articles 50-52.

<sup>115</sup> See European Commission, RASFF: Food and Feed Safety Alerts. Available at:

[http://www.ec.europa.eu/food/safety/rassf/index\\_en.htm](http://www.ec.europa.eu/food/safety/rassf/index_en.htm) .

<sup>116</sup> Under Regulation 882/2004, *supra* n. 55, Articles 36-40.

<sup>117</sup> European Parliament, *supra* n. 13, para. 57.

appoint an identified contact point on food fraud issues.<sup>118</sup> In addition, a dedicated computer network, the Administrative Assistance and Co-Operation System ('the AAC System'), has also been established to enable national contacts to liaise directly with one other.<sup>119</sup> Collectively, these measures seek to bolster Member State co-operation in food fraud cases. However, a number of weaknesses threaten to undermine their effectiveness in deterring food fraud.

RASSF and the AAC system work quite differently in practice. RASSF enables information to be notified simultaneously to food authorities in all Member States. In the past this information has included details of both food frauds considered likely to pose potentially serious food safety risks, as well as those that were not believed to pose such risks.<sup>120</sup> However, the Commission has signalled that in future only those cases that pose serious health risks should continue to be notified through RASSF.<sup>121</sup> Information on other cases would instead be exchanged through the AAC system.<sup>122</sup> However, the AAC system provides a forum that enables Member States to request and receive bi-lateral support where they

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<sup>118</sup> See, most recently, European Commission, Food Fraud Network Activity Report 2015. Available at:

[http://ec.europa.eu/food/safety/docs/official-controls\\_food-fraud\\_network-activity-report\\_2015.pdf](http://ec.europa.eu/food/safety/docs/official-controls_food-fraud_network-activity-report_2015.pdf).

<sup>119</sup> See Commission Implementing Decision 2015/1918 establishing the Administrative Assistance and Co-Operation system ('AAC system') pursuant to Regulation (EC) No. 882/2004 of the European Parliament and of the Council on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, [2015] OJ L280/31.

<sup>120</sup> See Commission Regulation 16/2011 of 10 January 2011 laying down the implementing measures for the Rapid alert system for food and feed, [2011] OJ 6/7, Articles 3 and 4.

<sup>121</sup> Commission, *The Rapid Alert System for Food and Feed 2015 Annual Report* (Luxembourg: Publications Office of the European Union, 2016) 27.

<sup>122</sup> *Ibid.*

uncover food fraud emanating from another Member State. Such collaboration will hopefully result in enforcement action that terminates the manufacture of the fraudulent products. However, it leaves a potential vacuum in that it may not address the on-going sale of the existing product in other Member States. Although the prioritisation of human health is understandable, it would also be important for the AAC system to be utilised to ensure food authorities in all Member States were fully aware of frauds impacting on other consumer interests. This would align more closely with the objectives of the Food Law Regulation in protecting the interests of consumers generally and ensuring that they are able to make informed choices about the foods they consume.<sup>123</sup>

The expectation that RASSF should only be used where a national authority considers that a particular instance of food fraud poses a risk to health requiring rapid cross border action also means that its use will be heavily dependent upon the assessment of individual national food authorities. The horsemeat scandal revealed that Member State authorities can have radically different attitudes towards such risks. Van der Meulen *et al.*, highlight that public health concerns led Dutch and German food authorities to respond to the horsemeat scandal by recalling meat and products made from meat supplied by operators linked to the scandal.<sup>124</sup> In Ireland, where the fraud was initially exposed, some food businesses voluntarily recalled products.<sup>125</sup> However, the risk to public health was not considered to be sufficient to merit compulsory recall measures.<sup>126</sup> Member States can similarly be expected

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<sup>123</sup> Regulation 178/2002, *supra* n. 8, Article 8.

<sup>124</sup> S. van der Meulen *et al.*, 'Fighting Food Fraud: Horsemeat Scandal; Use of Recalls in Enforcement

Throughout the EU' *European Food and Feed Law Review*, (2005) 1, 3-6.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

to adopt inconsistent approaches in their future use of RASSF in food fraud cases. Ultimately, the horsemeat scandal was shown not to pose significant public health risks. In future, however, an insufficiently precautionary approach by a national food authority could result in a decision not to notify a potential public health threat to other Member States through RASSF. Were such a decision later proven incorrect it would potentially have implications for public health across the European Union as a whole.

The current RASSF system has also been criticised as being a solely reactive tool, which only reveals food safety hazards when they occur.<sup>127</sup> This same criticism can also be levelled at the AAC System. One means to adopt a more preventative approach, which anticipates future food fraud issues, would be to utilise horizon scanning techniques. Factors such as commodity price changes, fluctuations in the availability of particular food stuffs or the impact of weather patterns can provide indirect indicators of food fraud risk.<sup>128</sup> For example, a global fall in horsemeat prices and rise in beef prices were signals that should have indicated the potential for the product substitution that precipitated the horsemeat scandal.<sup>129</sup> In the United Kingdom, a review of the Food Standards Agency's response to the horsemeat scandal noted a need to strengthen horizon scanning and intelligence analysis within the Agency.<sup>130</sup> The Elliott Review also recommended that the Agency should act as an 'intelligence hub', collecting, analysing and distributing information and intelligence from

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<sup>127</sup> H. Marvin, et al., 'Early Identification Systems for Emerging Foodborne Hazards' *Food and Chemical Toxicology* 47 (2009) 915-926, 915.

<sup>128</sup> C. Elliott, *supra* n. 70, 95.

<sup>129</sup> Comptroller and Auditor General, *supra* n.58, 26.

<sup>130</sup> P. Troop, Review of Food Standards Agency Response to the Incident of Contamination of Beef Products with Horse and Pork Meat and DNA: An Independent Report, (London: Food Standards Agency, 2013), 7.

other regulatory bodies.<sup>131</sup> There is also a similar need for such initiatives to be adopted at a European level. Here, the European Food Safety Authority is tasked with identifying emerging risks to food and feed safety.<sup>132</sup> In 2010 it established an Emerging Risks Exchange Network, to enable Member States to exchange information on possible emerging risks.<sup>133</sup> The Network comprises delegates from 21 European Union Member States and Norway, along with observers from the Commission, EU pre accession countries, the United States Food and Drug Administration and the United Nations Food and Agricultural Organisation.<sup>134</sup> However, the report of its meetings in 2014 reveals that discussions concentrated on existing issues, the substitution of pomegranate in fruit juices, the adulteration of lamb with other meats in takeaway meals and the contamination of meats with the growth hormone clenbuterol, rather than newly emerging frauds.<sup>135</sup> This serves to highlight the current policy gap. There is presently neither provision for horizon scanning at the European level, nor for an EU intelligence hub that can collate and distribute information from national food authorities or international bodies to provide early warning of potential food fraud issues. Such a body would also have a key role in identifying patterns of behaviour in food fraud cases detected across the European Union. It would also enable national authorities to target their resources in the manner most likely to detect fraud.

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<sup>131</sup> C. Elliott, *supra* n. 70, para. 4.12.

<sup>132</sup> Regulation 178/2002, *supra* n. 8, Articles 22(4) and 34(1).

<sup>133</sup> European Food Safety Authority, Annual Report of the Emerging Risk Exchange Network 2014, (Brussels: European Food Safety Authority, 2015), 3.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.* 10 and 12-13.

The interaction between separate criminal justice systems in individual Member States also creates an additional layer of complexity for the deterrence and enforcement of cross border crimes. To address this issue, the European Union has promoted greater co-operation in the investigation and prosecution of criminal cases through the establishment of the European Police Office ('Europol') and of Eurojust. Europol aims to promote mutual co-operation between police and other national law enforcement agencies in order to prevent and combat terrorism and serious or organised crime affecting more than one Member State.<sup>136</sup> In contrast, Eurojust seeks to develop co-operation between national investigating and prosecuting authorities in such cases.<sup>137</sup> Their roles include inviting national authorities to initiate investigations or, in the case of Eurojust, prosecutions and requesting those authorities to join with counterparts in other Member States to establish joint teams to investigate cross border crimes.<sup>138</sup> Eurojust can also exercise an arbitration role, requesting authorities in one Member State to recognise that those in another are better placed to investigate or prosecute a particular case or providing an advisory opinion in situations in which difficulties in judicial co-operation have been experienced within one Member State.<sup>139</sup>

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<sup>136</sup> Europol was established in 1999 under the Council Act of 26 July 1995 drawing up the Convention on the establishment of a European Police Office, [1999] Official Journal C316/1. It is today governed by Council Decision of 6 April 2009 on the establishment of the European Police Office ('the Europol Decision'), [2009] OJ L121/37. Europol's objectives are set out in article 3 to the Decision and in Article 88(1) TFEU.

<sup>137</sup> Eurojust was established under Council Decision of 28<sup>th</sup> February 2002 setting up Eurojust ('the Eurojust Decision'), [2002] OJ L63/1. Its objectives are set out in Article 3 to the Decision and in Article 85(1) TFEU.

<sup>138</sup> See the Europol Decision, Article 5 and the Eurojust Decision, Articles 6 and 7.

<sup>139</sup> Eurojust Decision, Articles 6 and 7.



Europol and Eurojust have both made positive contributions in helping Member States to tackle food fraud. Europol has collaborated with Interpol in each of the last five years in Operation Opson, which has targeted organised crime networks across the globe involved in producing counterfeit or substandard food and drink products.<sup>140</sup> Most recently, between November 2015 and February 2016, Operation Opson V resulted in the seizure of 10,000 tonnes of illegal food products in co-ordinated action across 57 countries.<sup>141</sup> Equally, in April 2015, Eurojust co-ordinated a joint investigation into fraud within the horsemeat trade, targeting the role of criminal gangs intent on introducing horsemeat unfit for human consumption into the food chain.<sup>142</sup> Here, joint action involving police and judicial authorities in France, Belgium, Germany, Ireland, Luxembourg, the Netherlands and the United Kingdom culminated in 26 arrests.<sup>143</sup> However, these high profile successes mask other situations in which cross border collaboration has proven to be much less effective. Indeed the European Parliament highlighted Member States' initial reluctance to work with Europol during the horsemeat scandal.<sup>144</sup> Academic commentators have also been critical

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<sup>140</sup> See European Police Office, Europol Review: General Report on Europol Activities (Luxembourg: Publications Office of the European Union, 2012) 51.

<sup>141</sup> Europol, Report: Operation Opson V, (The Hague: Europol, 2016). Available at: <https://www.europol.europa.eu/newsroom/news/food-fraud-joint-europol-interpol-operation-opson-v-results-report>.

<sup>142</sup> Eurojust, Eurojust Annual Report 2015 (The Hague: Eurojust, 2016) 37.

<sup>143</sup> *Ibid.*

<sup>144</sup> European Parliament, *supra* n. 13, para. Y.

of the under use of the resources available through Europol and Eurojust, in particular, of the limited use of joint investigation teams.<sup>145</sup>

Greater co-operation between national law enforcement authorities and both Europol and Eurojust has been inhibited by several factors. Chief amongst these has been lack of trust.<sup>146</sup> Commentators highlight police culture as creating a reluctance to share intelligence with other forces through Europol.<sup>147</sup> Lack of trust has also been identified as rendering police officers more likely to use existing, informal, contacts to pursue investigations rather than working with Europol.<sup>148</sup> This mistrust is also replicated amongst prosecutors and judges,<sup>149</sup> who may be reluctant to rely upon the accuracy or admissibility of information obtained through Europol and Eurojust to initiate cases or to avoid following up aspects of cases involving other jurisdictions for fear that this will delay the progress of the cases through their national courts or result in conflicts of jurisdiction.<sup>150</sup> Lack of trust is compounded by

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<sup>145</sup> See, A. Suominen, 'The Past, Present and Future of Eurojust' *Maastricht Journal of European and Comparative Law* 15 (2008):217-234, 227; G. Vernimmen-Van Tiggelen and L. Surano, *Analysis of the future of mutual recognition in criminal matters in the European Union* (Brussels: Universitié de Bruxelles, 2008) 20; M. Busuioc and M. Groenleer, 'Beyond Design: The Evolution of Europol and Eurojust' [2013] 14 *Perspectives on European Politics and Society* 14 (2013): 285-304, 290 and S. Rozée, C. Kaunert and S. Léonard, 'Is Europol a Comprehensive Policing Actor?' [2013] 14 *Perspectives on European Politics and Society* 14 (2013):372-387, 375.

<sup>146</sup> M. Busuioc and M. Groenleer, *supra* n.145, 300.

<sup>147</sup> S. Rozée, C. Kaunert and S. Léonard, *supra* n. 145, 375.

<sup>148</sup> S. Rozée, C. Kaunert, S. Léonard, *supra* n. 145, 375.

<sup>149</sup> J. Monar, 'Eurojust and the European Public Prosecutor Perspective: From Co-operation to Integration in EU Criminal Justice', *Perspectives in European Politics and Society* 14 (2013): 339-356, 342.

<sup>150</sup> M. Busuioc and M Groenleer *supra* n. 145, 294.

limited familiarity with the resources available through Europol and Eurojust.<sup>151</sup> The outcome is that not only are Europol and Eurojust not being used as often as they should, but they are also not always being used effectively. Suominen argues that contact with Eurojust is often made too late, which reduces its ability to support national prosecutors in avoiding delays in prosecuting individual cases.<sup>152</sup>

## 6. Conclusion

The horsemeat scandal uncovered a large scale food fraud that was being perpetrated across a number of European Union Member States. The case illustrated that such frauds raise a number of important consumer protection issues. In the European Union, the Food Law Regulation establishes an objective of preventing fraudulent practices from affecting foods.<sup>153</sup> It is also supported by the prohibition on misleading food labelling, contained within the Food Information Regulation.<sup>154</sup> This article has examined whether the regulatory framework that underpins these objectives acts as an effective deterrent against such crimes. In this situation, it is not enough to strive to ensure that the penalties imposed by national courts at least offset the economic advantage that criminals sought to gain. This must also be supported by a robust legal framework that ensures that criminals engaging in food fraud face a significant risk of being detected.

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<sup>151</sup> *Ibid*, 290.

<sup>152</sup> A. Suominen, *supra* n. 144, 227.

<sup>153</sup> Regulation 178/2002, *supra* n. 8, Article 8.

<sup>154</sup> Regulation 1169/2011, *supra* n. 17, Article 7(1) (a).

Examined at face value, the European Union appears to have established a comprehensive legal framework to address food fraud. However, this article revealed a number of weaknesses that limit its deterrent effect. The traceability of food ingredients and the official controls performed on European food producers and on products imported from third countries lie at the heart of the European Union legal framework. In terms of traceability, the 'one up, one down' traceability scheme creates a paper chase for national food authorities that may serve to mask fraudulent behaviour. Equally, weaknesses within the livestock traceability measures in place for horses and beef cattle also provide continued opportunities for fraud. Similarly, the broad discretion conferred upon Member States in implementing controls, both internally and at European Union borders, has resulted in wide divergence in practice and created opportunities for exploitation. This reveals a need for greater harmonisation in establishing minimum controls and in ensuring that foods at particular risk from fraud are regularly inspected. The European Union must also play a more active role in co-ordinating and distributing intelligence that enables Member States to anticipate emerging frauds and to implement preventative controls. It is therefore concerning that the new AAC system may actually result in less information about food fraud cases being circulated to all Member States.

However, the principal responsibility for safeguarding European consumers from food fraud lies with Member State competent authorities. In the past they often failed to prioritise food fraud when conducting controls on both European and imported food products. They have also yet to fully utilise Europol and Eurojust to co-operate in the investigation and prosecution of criminals involved in food frauds. Ultimately, the horsemeat scandal provided a wake-up call for both the European Union and its Member States. However,

there is also a danger that the fact that it did not pose a significant threat to consumer health may also have been a comfort blanket. To avoid such an outcome in future, both the European Union and the Member States must ensure that the legal framework provides a more uniformly effective deterrent. They must ensure not only that those who are caught committing food fraud do not profit from their crime, but also that there is a significant likelihood that those who commit the crime will be caught.